TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 45.

JOHN McHENRY, ELLEN J. McHENRY, HIS WIFE, C. C. WEBB, WILLIAM B. HUGHES, AND MONTGOMERY GODLEY, ASSIGNEE IN BANKRUPTCY OF THE ESTATE OF JOHN McHENRY, A BANKRUPT, PLAINTIFFS IN ERROR,

vs.

LA SOCIÉTÉ FRANÇAISE D'ÉPARGNES ET DE PRÉVOYANCE MUTUELLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 29, 1875.

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1 [Original.]

In the supreme court of the State of California.

LA SOCIÉTÉ FRANÇAISE D'ÉPARGNES ET DE Prévoyance Mutuelle, respondent,
vs.
JOHN MCHENRY AND ELLEN J. MCHENRY, appellants.
} No. 3840. Transcript on appeal.

James B. Townsend, attorney for appellants.
T. J. Gallahgher, attorney for respondent.

Received San Francisco, June 14th, 1873, a copy of this transcript on appeal.

T. J. GALLAGHER,
Att'y for Resp't.

Filed June 16th, 1873.

GRANT J. TAGGART, *Clerk*,
2 By ALLEN TILLINGHAST, *D. C.*

3 In the district court of the nineteenth judicial district of the State of California, held in and for the city and county of San Francisco.

LA SOCIÉTÉ FRANÇAISE D'ÉPARGNES ET DE Prévoyance Mutuelle, a corporation duly incorporated under the laws of the State of California, plaintiff,
vs.
JOHN MCHENRY, ELLEN J. MCHENRY, HIS wife, C. C. Webb, William B. Hughes, Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, John Doe, and Richard Roe, defendants.

Complaint.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

4 La Société Française d'Épargnes et de Prévoyance Mutuelle, the above-named plaintiff, complaining of John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, John Doe, and Richard Roe, the above-named defendants, for cause of complaint, alleges and shows that the plaintiff was at the dates hereinafter set forth, and is now, a corporation duly incorporated under the laws of the State of California for the purpose of receiving deposits of money, preserving the same from loss, and finding secure and profitable investment therefor, and that its principal place of business is in the city and county of San Francisco.

And this plaintiff further alleges and shows that heretofore, to wit, on the eighteenth day of June, A. D. one thousand eight hundred and

seventy, at the city and county of San Francisco aforesaid, the said defendant, John McHenry, for a valuable consideration, made and delivered to this plaintiff his certain promissory note in writing, bearing date on that day, whereby the said defendant, John McHenry, promised to pay to this plaintiff or to its order the sum of fourteen thousand dollars, in gold coin of the United States, in twelve months after the date thereof, without grace, and to pay interest thereon, in like gold coin, at the rate of one per cent. per month, payable monthly in advance, until the said principal sum of fourteeen thousand dollars should be fully paid.

5 And in and by said promissory note the said defendant, John McHenry, further promised and agreed that if default should be made in the payment of any installment of interest thereon, the amount so due and unpaid should be added to the said principal sum, and should bear interest at the said rate of one per cent. per month, payable in like gold coin as aforesaid; and that if such default should continue for the period of ten days, the principal sum should thereupon become immediately due and payable, as by the said promissory note, a copy of which is hereto annexed, marked "A," and prayed to be taken as part of this complaint, will more fully appear.

And the said defendant, John McHenry, in order to secure the payment of the said sum of fourteen thousand dollars and the interest to grow due thereon, as provided in the said promissory note, did, on the said eighteenth day of June, A. D. one thousand eight hundred and seventy, execute under his hand and seal and deliver to this plaintiff a certain indenture of mortgage, bearing even date with the said promissory note, whereby the said defendant, John McHenry, did mortgage unto this plaintiff certain lands and real estate situate in the city and county of San Francisco, State of California, and described as follows, to wit:

Commencing at the northwesterly corner of Washington and Taylor streets, running thence northerly along the westerly line of Taylor street sixty (60) feet; thence westerly at right angles to the last course

6 one hundred and twenty-seven (127) feet and six (6) inches, to an alley-way; thence southerly along the easterly line of said alley-way sixty (60) feet, to the northerly line of Washington street, and thence easterly along said northerly line of Washington street one hundred and twenty-seven (127) feet and six (6) inches, to the westerly line of Taylor street and the point of commencement—being part of fifty-vara lot number eight hundred and seventeen, (817,) as laid down and marked on the official map or plan of said city and county of San Francisco, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

With the condition in substance, among other conditions in the said indenture of mortgage contained, that if default should be made in the payment of the said promissory note, or in the interest to grow due thereon, it should be lawful for this plaintiff or its assigns to foreclose the equity of redemption of the said defendant, John McHenry, his heirs and assigns, in and to the lands and real estate in the said indenture of mortgage described, and to sell the said lands and premises, or cause the same to be sold, and out of the proceeds of such sale to retain the principal sum and interest mentioned in the said promissory note, and due pursuant to the terms and conditions thereof, together with all costs and charges of such foreclosure and sale, including counsel-fees, at the rate of ten per cent. on the amount due for principal and

7 interest, which said indenture of mortgage was duly acknowledged and was afterwards, to wit, on the eighteenth day of June, A. D.

one thousand eight hundred and seventy, duly recorded in the office of the county recorder of the city and county of San Francisco, in Liber 298 of Mortgages, page 212, and following, as by the said indenture of mortgage and the certificates and endorsements thereon, a copy of which is hereto annexed, marked "B," and prayed to be taken as part of this complaint, will more fully appear.

And this plaintiff further alleges and shows that the said defendant, John McHenry, in and by the said indenture of mortgage aforesaid, further covenanted and agreed with the plaintiff to keep the buildings on the said above-described mortgaged premises insured against loss or damage by fire to the amount of at least eight thousand dollars, so long as the moneys thereby secured should remain unpaid, and to assign and to keep assigned the policy of such insurance, and in default thereof that this plaintiff might take or effect an insurance on the said premises aforesaid to the amount aforesaid, and that the premium and expenses of such insurance should be immediately paid by the said defendant to plaintiff, and if not so paid, should be added to and become a part and parcel of the moneys thereby secured, and should bear interest in like manner as provided in said promissory note, and at the rate of two per cent. per month, and be a lien upon the said mortgaged premises, and secured thereby.

8 And this plaintiff further shows that afterwards, to wit, on the 20th day of March, A. D. 1872, the said defendant, John McHenry, was, in and by the judgment, decree, and determination of the district court of the United States in and for the district of California, duly and regularly adjudicated and decreed to be a bankrupt under the provisions of an act of Congress of the United States entitled "An act to provide for a uniform system of bankruptcy throughout the United States," approved March 2d, A. D. 1867; that afterwards, to wit, on the 12th day of April, A. D. 1872, the defendant herein, Montgomery Godley, was duly elected assignee in bankruptcy of said defendant, J. McHenry, by the creditors of said last-named defendant, John McHenry, bankrupt, and said election was afterwards, and on said 12th day of April, A. D. 1872, duly confirmed by the said court.

That afterwards, and on the 15th day of April, A. D. 1872, the said defendant, Montgomery Godley, assignee as aforesaid, became and was vested with all the estate of said bankrupt in and to the premises aforesaid by operation of law and conveyance duly executed and delivered on the day last aforesaid, under the act of Congress aforesaid, and recorded in the office of the county recorder of the city and county of San Francisco, in Liber 662 of Deeds, page 169.

And this plaintiff further alleges and shows that it is still the owner and holder of the said promissory note and mortgage, and that

9 default has been made in the payment of the said promissory note in this: That the said defendant, John McHenry, although often thereto requested, hath wholly failed and refused to pay the same, or any part thereof; and that no part of the same has been paid, and the same is now due and payable to plaintiff under the terms and conditions thereof, together with interest thereon as hereinafter set forth.

And this plaintiff further alleges and shows: That under the terms and provisions of the said mortgage, this plaintiff, on the 20th day of April, A. D. 1872, paid for premium upon insurance upon the premises hereinbefore described the sum of eighteen dollars and seventy cents, in gold coin, which premium the said defendant, John McHenry, has refused and neglected to pay.

And this plaintiff further alleges and shows that there is now due to this plaintiff, on and by virtue of the said promissory note and mortgage, the said principal sum of fourteen thousand dollars, gold coin of the United States, with interest thereon since the eighteenth day of November, A. D. one thousand eight hundred and seventy-one, at the rate of one per cent. per month, compounding monthly, in accordance with the terms of said promissory note; and also the sum of eighteen dollars and seventy cents, in gold coin, paid by plaintiff for insurance aforesaid, together with interest thereon from the said 20th day of April, A. D. 1872, at the rate of two per cent. per month, together with
10 ten per cent. on the entire amount due this plaintiff as aforesaid, as and for counsel-fees, as provided in the said indenture of mortgage.

And this plaintiff further alleges and shows that the defendants, John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, John Doe, and Richard Roe, claim some lien, right, title, interest, or estate in or to the said mortgaged lands and premises, which lien, right, title, interest, or estate, if any, are subsequent to the lien of the aforesaid indenture of mortgage held by plaintiff and subject thereto.

And this plaintiff further shows that no proceedings at law have been taken to recover the amount due by said promissory note, or any part thereof.

And this plaintiff further alleges and shows that the real names of the defendants sued herein by the fictitious names of John Doe and Richard Roe are unknown to plaintiff, but when discovered plaintiff prays they may be inserted herein in lieu of said fictitious names.

Wherefore the plaintiff prays judgment against the said defendant Montgomery Godley, assignee in bankruptcy of the estate of said John McHenry, bankrupt, for the sum of fourteen thousand dollars, in gold coin of the United States, and interest thereon, in like gold coin, from the 18th day of November, A. D. 1871, at the rate of one per
11 cent. per month, compounded monthly, in accordance with the terms of said promissory note, together with the sum of eighteen dollars and seventy cents, paid by plaintiff for insurance on the mortgaged premises as aforesaid, together with interest thereon, in like gold coin, from the said twentieth day of April, A. D. one thousand eight hundred and seventy-one, at the rate of two per cent. per month, together with ten per cent. on the amount of said principal and interest for counsel-fees and the costs and expenses of this action, all in like gold coin.

That the usual decree may be entered for the foreclosure of the said mortgage, and for the sale of the said mortgaged lands and premises for gold coin of the United States, by the sheriff of the said city and county of San Francisco, according to law and the practice of this court, and that out of the proceeds thereof there be paid to this plaintiff, in gold coin of the United States, the said principal sum of fourteen thousand dollars, and interest at the rate of one per cent. per month, as provided in the said promissory note, since the eighteenth day of November, A. D. one thousand eight hundred and seventy-one, and the sum of eighteen $\frac{70}{100}$ dollars, paid for insurance as aforesaid, with interest thereon as aforesaid, together with ten per cent. on the amount of said principal and interest for counsel-fees, as provided in the said indenture of mortgage, and the costs and expenses of this foreclosure, or so much thereof as said proceeds will pay; and that if the said proceeds shall not be

12 sufficient to pay the said principal sum and interest, counsel-fees, and cost and expenses, this plaintiff have judgment against the said defendant, Montgomery Godley, assignee in bankruptcy of the estate of said John McHenry, bankrupt, for the deficiency and execution therefor.

That the plaintiff or any other party to this suit may become purchasers at the said sale; that the sheriff execute a deed to the purchaser, and the said purchaser be let into the possession of the premises on production of the sheriff's deed.

And that the said defendants, John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, John Doe, and Richard Roe, and each of them, and all other persons having or claiming to have any lien, right, title, interest, or estate in or to the said mortgaged lands and premises, or any part thereof, subsequent to the lien of the said indenture of mortgage held by plaintiff, may be forever barred and foreclosed of all equity of redemption therein, and that this plaintiff have such other and further relief in the premises as to this court seems meet and shall be agreeable to equity.

T. J. GALLAGHER,
Attorney for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Gustave Mahe, of said city and county, being duly sworn, says:

13 That he is director and superintendent of "La Société Française d'Épargnes et de Prévoyance Mutuelle," the plaintiff in the above-entitled action; that he has charge of the accounts of the said corporation and of the disbursement and receipt of the moneys thereof; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as to such matters he believes it to be true.

GUSTAVE MAHE.

Sworn and subscribed to before me this 13th day of August, A. D. 1872.

[SEAL.] HENRY S. TIBBEY,
Notary Public.

A.

$14,000. SAN FRANCISCO, *June 18th*, 1870.

Twelve months after date, (without grace,) I promise to pay to "La Société Française et de Prévoyance Mutuelle," (a corporation duly organized under the laws of the State of California, and having its principal place of business in the city and county of San Francisco,) or order, the sum of fourteen thousand dollars, gold coin of the United States, of the standard of the year one thousand eight hundred and sixty-one, with interest thereon, until paid, at the rate of one per cent. per month, payable monthly in advance, in like gold coin; and I agree that if default be made in the payment of any installment of in-

14 terest, the amount so due and unpaid shall be added to the principal sum, and shall bear interest at the above-mentioned rate, payable in like gold coin; and if default shall continue for the period of ten days, the principal sum shall thereupon immediately become due and payable, value received.

JOHN McHENRY.

B.

[U. S. revenue-stamp, $14.00, affixed and canceled.]

This indenture, made the eighteenth day of June, in the year of our Lord one thousand eight hundred and seventy, between John McHenry, of the city and county of San Francisco, State of California, party of the first part, and "La Société Française d'Épargnes et de Prévoyance Mutuelle," (a corporation duly organized under the laws of the State of California, and having its principal place of business in the city and county of San Francisco,) party of the second part.

Whereas the said John McHenry is justly indebted to the party of the second part in the sum of fourteen thousand dollars, gold coin of the United States, of the standard of the year one thousand eight hundred and sixty-one, secured to be paid by his certain promissory note, bearing even date with these presents, in the words and figures following, viz:

$14,000. SAN FRANCISCO, *June 18th*, 1870.

Twelve months after date, (without grace,) I promise to pay to
15 La Société Française d'Épargnes et de Prévoyance Mut'elle, (a corporation duly organized under the laws of the State of California, and having its principal place of business in the city and county of San Francisco,) or order, the sum of fourteen thousand dollars, gold coin of the United States, of the standard of the year one thousand eight hundred and sixty-one, with interest thereon until paid at the rate of one per cent. per month, payable monthly in advance, in like gold coin. And I agree that if default be made in the payment of any installment of interest, the amount so due and unpaid shall be added to the principal sum, and shall bear interest at the above-mentioned rate, payable in like gold coin; and if such default shall continue for the period of ten days, the principal sum shall thereupon become immediately due and payable, value received.

Now this indenture witnesseth: That the said party of the first part, for the better securing the payment of the said sum secured to be paid by the said promissory note, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the re*re*ceipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm unto the said
16 party of the second part and assigns forever, all that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and described as follows, to wit: Commencing at the northwesterly corner of Washington and Taylor streets, running thence northerly along the westerly line of Taylor street sixty (60) feet; thence westerly at right angles to the last course one hundred and twenty-seven (127) feet and six (6) inches, to an alley-way; thence southerly along the easterly line of said alley-way sixty (60) feet to the northerly line of Washington street, and thence easterly along said northerly line of Washington street one hundred and twenty-seven (127) feet and six (6) inches to the westerly line of Taylor street and the point of commencement.

Being part of fifty-vara lot number eight hundred and seventeen, (817,) as laid down and marked on the official map or plan of said city and county of San Francisco, together with all and singular the tene-

ments, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the same, and every part and parcel thereof, with the appurtenances.

17 To have and to hold the above granted and described premises, with the appurtenances unto the said party of the second part and assigns, to its and their own proper use, benefit, and behoof forever. Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, or administrators, shall well and truly pay unto the said party of the second part, or assigns, the said sum of money secured to be paid by the said promissory note, and the interest thereon, at the time and in the manner mentioned in the same, according to the true intent and meaning thereof, and also pay the other moneys hereinafter agreed to be paid as herein provided, then these presents and the estate hereby granted shall cease, determine, and be void. And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, or assigns, the said sum of money and interest, as mentioned above, and secured to be paid as aforesaid. And if default be made in the payment of the said promissory note, or in the interest to grow due thereon, then in that case it shall be lawful for the said party of the second part, or its assigns, to foreclose the equity of redemption of the said party of the first part, his heirs and assigns, in and to the lands and premises hereinbefore described, and to sell the said lands and premises, or cause the same to be sold.

18 And out of the proceeds of such sale to retain the principal and interest mentioned in the said promissory note, and due pursuant to the terms and conditions thereof, together with all costs and charges of such foreclosure and sale, including counsel-fees, at the rate of ten per cent. on the amount due for principal and interest. And also all moneys which may have been paid by the said party of the second part, or its assigns, for taxes, assessments, liens, or incumbrances on the said lands and premises, with interest at the rate of two per cent. per month.

And in the event that any action be commenced for the recovery of the money mentioned in the said promissory note, or for the foreclosure of this mortgage, ten per cent. on the amount due shall be allowed, in the nature of costs, to the said party of the second part, or its assigns, for counsel-fees, to be paid by the said party of the first part, his heirs, executors, or administrators, and which counsel-fees shall be considered due upon the filing of a complaint in such action, whether any further proceedings be had therein or not, and shall be deemed secured by these presents.

And if during the continuance of these presents the said party of the second part shall be assessed for State, city, or county taxes, the principal sum secured by these presents shall be deemed part of such assessment. And if the said party of the second part shall pay, or be liable, or prima facie liable, for the taxes on such assessment, the said party of the first part shall pay to the said party of the second part,

19 on demand, such proportion of said taxes as the principal sum secured by these presents bears to the whole sum so assessed. And these presents shall be held to secure the payment of said proportion.

And the said party of the first part further covenants and agrees with the said party of the second part to pay and discharge at maturity all liens and incumbrances now subsisting, and also all taxes, charges, and assessments which are now or may hereafter be imposed upon said land and premises, (and upon this mortgage, or the moneys hereby secured during its continuance,) and in default thereof, the said party of the second part shall have the right to pay and discharge the same, and shall be the sole judge of the legality of all such liens, incumbrances, taxes, assessments, or other charges; and the sum so paid shall bear interest at the rate of two per cent. per month from the time of payment by the party of the second part, and shall be, and is hereby, secured by these presents, and be a lien upon said premises, and shall be deducted from the proceeds of the sale thereof above mentioned, with interest as herein provided.

And the said party of the first part, for himself, his heirs, executors, administrators, and assigns, covenant' with the said party of the second part, and assigns, to keep the buildings now standing, or hereafter to be erected on the above-described premises, insured against loss or damage by fire, to the amount of at least eight thousand dollars, so long as the moneys hereby secured, or intended so to be, shall remain unpaid, and to assign and to keep assigned to the said party of the second part, its successors and assigns, the policy or policies and certificate of such insurance; and in case of failure to keep or continue such insurance and assignment of the policy or policies and certificates thereof, that then the said party of the second part, or assigns, may take or effect an insurance to the amount aforesaid, returning the policy or certificate in same manner as if duly and formally assigned for the use of the party of the second part. The premium and expenses of such insurance shall be immediately paid to the said party of the second part, or assigns, by the party of the first part, his executors or administrators, and shall, unless so paid, be added to and become a part and parcel of the moneys secured hereby, and draw interest in like manner as is provided in said promissory note, and at the rate of two per cent. per month, and be a lien upon the said mortgaged premises and secured by these presents.

All moneys payable by the party of the first part arising or accruing under any of the terms or provisions of this mortgage shall be paid in the gold coin of the United States of the standard of the year one thousand eight hundred and sixty-one.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

[SEAL.] JOHN McHENRY.

Signed, sealed, and delivered in presence of, being first duly stamped— H. S. TIBBEY.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On the eighteenth (18th) day of June, A. D. one thousand eight hundred and seventy, (1870,) before me, Henry S. Tibbey, a notary public in and for said city and county, duly commissioned and sworn, and therein residing, personally appeared the within-named John McHenry, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the individual described in, and who executed, the said annexed instrument as a party thereto, and said John McHenry acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] HENRY S. TIBBEY,
Notary Public.

(Endorsed:)
Recorded in the office of the county recorder of the city and county of San Francisco June 18th, A. D. 1870, at 56 minutes past 2 o'clock p. m., in Liber 298 of Mortgages, page 212.

W'M L. HIGGINS,
County Recorder.

(Endorsed:) "Complaint on foreclosure of mortgage."
Filed August 15th, 1872.

W'M HARNEY, *Clerk*,
By L. J. LEE, *Dep. Clerk.*

22 *Summons.*

[Title of court and cause.]

The people of the State of California send greeting to John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, John Doe, and Richard Roe, defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise, within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover judgment against the defendant, Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, for the sum of fourteen thousand dollars, in gold coin of the United States, with interest thereon, in like gold coin, from the 18th day of November, A. D. 1871, at the rate of one per cent. per month, compounding monthly; and the sum of eighteen and $\frac{70}{100}$ dollars,
paid for insurance premium under the terms and provisions of
23 said mortgage, with interest thereon, in like gold coin, from the
20th day of April, A. D. 1871, at the rate of two per cent. per month, together with ten per cent. on the amount of said principal and interest for counsel-fees and the costs and expenses of suit, all in gold coin.

Also, for the foreclosure of a certain mortgage made by said defendant, John McHenry, to said plaintiff, bearing date the eighteenth day of June, A. D. 1870, to secure the promissory note of said defendant, John McHenry, to said plaintiff for said sum of fourteen thousand dollars, in gold coin of the United States, with interest thereon, in like gold coin, at the rate of one per cent. per month, payable monthly in advance; which said mortgage is recorded in the office of the county recorder of the city and county of San Francisco, in Liber 298 of Mortgages, on page 212, and for a sale of the lands and premises mentioned in the said indenture of mortgage, and that out of the proceeds of such sale there be paid to the plaintiff, in gold coin of the United States, the sum of

fourteen thousand dollars, with interest as aforesaid from the date aforesaid, compounded, (together with the said sum of eighteen and $\frac{70}{100}$ dollars, with interest as aforesaid from the date aforesaid,) together with ten per cent. on the amount of said principal and interest for counsel-fees, as provided in the said mortgage, and the costs and expenses of this action, or so much thereof as said proceeds will pay, and that if the said proceeds shall not be sufficient to pay the said principal sum and interest, counsel-fees, and costs and expenses, that
24 the plaintiff have judgment against said defendant for the deficiency and execution therefor.

And that the defendants, and each of them, and all persons having or claiming to have any lien, right, title, interest, or estate in or to the mortgaged lands and premises subsequent to the lien of this plaintiff's mortgage, may be forever barred and foreclosed of all equity of redemption therein.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief prayed for in the complaint.

Given under my hand and seal of the district court of the nineteenth judicial district of the State of California in and for the city and county of San Francisco this 15th day of August, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] WILLIAM HARNEY, *Clerk*,
By L. J. LEE, *Deputy Clerk.*

Sheriff's return.

OFFICE OF THE SHERIFF OF THE
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 15th day of August, A. D. 1872, and personally served the same on the 15th day of August, A. D. 1872, upon Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt; and on the 16th day of August, A. D. 1872, upon Ellen J. McHenry and C. C. Webb,
25 three of said defendants, by delivering to each of said defendants personally, in the city and county of San Francisco, a copy of said summons, the summons so served on Montgomery Godley, assignee, etc., being attached to a copy of the complaint in said action therein named. I further certify that, after due and diligent search and inquiry, I cannot find John McHenry in said city and county.

Dated at San Francisco this 16th day of August, A. D. 1872.

JAMES ADAMS, *Sheriff*,
By H. CLASSEN, *Deputy Sheriff.*

(Endorsed:) Filed August 19th, 1872. William Harney, clerk, by Bert McNulty, deputy clerk.

Admitted this 10th day of August, A. D. 1872.

J. C. BATES,
Att'y for Def't W'm Hughes.

Entry of default of Montgomery Godley.

In this action the defendant, Montgomery Godley, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises is hereby duly entered according to law.

Attest my hand and seal of said court, this 11th day of September, A. D. 1872.

[SEAL.] WILLIAM HARNEY, *Clerk*,
By BERT. McNULTY, *Deputy Clerk*.

26 *Entry of default of C. C. Webb.*

In this action the defendant, C. C. Webb, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises is hereby duly entered according to law.

Attest my hand and seal of said court, this 19th day of March, A. D. 1873.

[SEAL.] WILLIAM HARNEY, *Clerk*,
By FRANK F. STONE, *Deputy Clerk*.

Separate answer of Def't Hughes.

[Title of court and cause.]

Now comes W'm B. Hughes, one of the defendants in this action, and, for his separate answer to plaintiff's complaint, alleges:

That he claims a lien on said mortgaged premises described in said complaint, subsequent and subject to said plaintiff's, and the nature and extent of which is as follows:

That after making of the mortgage mentioned and set forth in plaintiff's complaint, and which said plaintiff has instituted this suit to foreclose, said mortgagor, John McHenry, and Ellen J. McHenry, his wife, on the 6th day of February, 1872, made, executed, and delivered to this defendant a certain indenture of mortgage to secure the sum of
27 $1,500 U. S. gold coin, with interest thereon at the rate and in the time mentioned in said mortgage, and according to the conditions thereof, which said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the 17th day of April, 1872, duly recorded in the office of the county recorder of said city and county of San Francisco, in Liber 353 of Mortgages, on page 241, a copy of which said mortgage, with the endorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this answer.

That neither the principal 'or interest mentioned in said note and mortgage, or either of them, or any part of said principal or interest, has been paid and no proceedings taken to foreclose defendants' said mortgage.

Wherefore said defendant, W'm B. Hughes, asks and demands that if a foreclosure be adjudged by said court, that all the surplus money arising from the sale of such mortgaged premises, if any there be, after the principal, interest, costs, and reasonable amount for attorney's fee are paid to said plaintiff, be paid and delivered to this defendant or his attorney, or so much of such surplus money as will satisfy said defendant's mortgage and lien, with interest thereon according to the terms thereof.

J. C. BATES,
Att'y for Defendant W'm B. Hughes.

28 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. C. Bates, being duly sworn, says that he is attorney for defendant W'm B. Hughes in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. And deponent further states that said defendant is now absent from this city and county and State, and that the matters set forth in said answer are within deponent's knowledge, by reason whereof he makes this verification.

J. C. BATES.

Subscribed and sworn to before me, this nineteenth day of August, A. D. 1872.

[SEAL.] F. J. THIBAULT,
Notary Public.

EXHIBIT A.

[50c. int. rev. stamp, canceled.] [25c. int. rev. stamp, canceled.] [50c. int. rev. stamp, canceled.] [25c. int. rev. stamp, canceled.]

This indenture, made the sixth day of February, in the year of our Lord one thousand eight hundred and seventy-two, between John McHenry and Ellen J. McHenry, his wife, parties of the first part, and W'm B. Hughes, of the second part, all said parties residing in the city and county of San Francisco, State of California, witnesseth:

29 That the said parties of the first part, for and in consideration of the sum of fifteen hundred dollars, gold coin of the United States of America, to them in hand paid, do grant, bargain, sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot of land situated in said city and county of San Francisco, described as follows, to wit:

Commencing at the intersection of the northerly line of Washington street with the westerly line of Taylor street; thence running westerly on said northerly line of Washington street one hundred and twenty-eight feet six inches; thence at right angles northerly sixty feet; thence at right angles easterly one hundred and twenty-eight feet six inches, to the said westerly line of Taylor street; thence along the westerly line of Taylor street sixty feet southerly to the point of commencement, said lot forming the northwesterly corner of Washington and Taylor streets, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, with right of homestead.

This conveyance is intended as a mortgage to secure the payment of a certain promissory note bearing even date herewith, executed by John McHenry, of the first part, in favor of the party of the second part, for $1,500, with interest at one and one-quarter per cent. from date until paid, and payable one month after date, for value received; and these presents shall be void if such payment be made, (according to the

30 tenor and effect thereof.) But in case default be made in the payment of the principal or interest, as the same becomes due as therein provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises with all and every of the appurtenances or any part thereof, in the manner prescribed by law; and out of the money arising from such

sale to retain the said principal and interest, together with the cost and charges of making such sale, if any, and the overplus, if any there be, shall be made by the party making such sale, on demand, to the said parties of the first part, their heirs or assigns.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN McHENRY. [SEAL.]
ELLEN J. McHENRY. [SEAL.]

Signed, sealed, and delivered in presence of—
PHILLIP MAHLER.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On the seventh day of February, A. D. one thousand eight hundred and seventy-two, before me, Phillip Mahler, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared John McHenry and Ellen J. McHenry, his wife, whose names are subscribed to the annexed instrument as parties thereto, severally personally known to me to be the same persons
31 described in and who executed the said instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

And the said Ellen J. McHenry, wife of said John McHenry, having been by me first made acquainted with the contents of such instrument, duly acknowledged to me, on an examination separately and apart from and without the hearing of her husband, that she executed the same freely and voluntarily, for the uses and purposes therein mentioned, without fear, compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco the day and year last above written.

[SEAL.] PHILLIP MAHLER,
Notary Public.

(Endorsed:) "Separate answer of W'm B. Hughes."

Service admitted this 20th day of August, A. D. 1872.
GALLAGHER & PIERSON,
Att'ys for Plaintiff.

Filed August 20th, 1872.

W'M HARNEY, *Clerk*,
By BERT. McNULTY,
Deputy Clerk.

32 *Demurrer of Ellen J. McHenry.*

[Title of court and cause.]

And now comes Ellen J. McHenry, wife of the said John McHenry, and demurs to the complaint of the said plaintiff herein, and specifies the grounds of her said demurrer thereto as follows, to wit:

1st. That it appears from the face of said complaint that the property described in said complaint is not within the said nineteenth judicial district, and that this court has not jurisdiction of the subject of said action.

2d. That said plaintiff has no legal capacity to sue or maintain said action.

3d. That there is another action, to wit, an action in bankruptcy, pending in the district court of the United States in and for the district of California, between the said John McHenry and the said plaintiff herein and others, embracing the same cause of action sued upon herein.

4th. That there is a misjoinder of parties defendant herein, inasmuch as no cause of action whatever is shown against this defendant, nor that she is a necessary or proper party hereto.

5th. That several causes of action have been improperly united herein.

6th. That said complaint does not state facts sufficient to constitute a cause of action in favor of said plaintiff against this defendant.

7th. That said complaint shows that this defendant is a mar-
33 ried woman, the wife of the said John McHenry, but fails to show any legal cause or right to implead her herein.

8th. That no leave to bring this action is shown to have been granted by said United States district court prior to the bringing of the same or at any time.

9th. That said complaint is ambiguous, unintelligible, and uncertain.

JAMES B. TOWNSEND,
Attorney for Ellen J. McHenry.

(Endorsed:)

Due service of a copy of the within demurrer upon me is hereby admitted this 3d day of September, A. D. 1872.

GALLAGHER,
Attorney for Plaintiff.

Filed Sept. 3, 1872.

W'M HARNEY, *Clerk*,
By L. J. LEE,
Deputy Clerk.

Demurrer of John McHenry.

[Title of court and cause.]

And now comes John McHenry and demurs to the complaint of the said plaintiff herein, and specifies the grounds of his said demurrer thereto as follows, to wit:

1st. That it appears from the face of said complaint that the property described in said complaint is not within the said 19th judicial district, and that this court has not jurisdiction of the subject of said action.

34 2d. That said plaintiff does not appear to have legal capacity to sue or maintain said action.

3d. That there appears to be another action, to wit, an action in bankruptcy, pending in the district court of the United States in and for the district of California, between the said John McHenry and the said plaintiff herein and others, embracing the same cause of action sued upon herein.

4th. That there appears to be a misjoinder of parties defendant herein, inasmuch as no cause of action whatever is shown against the defendant, Ellen J. McHenry, nor is it shown that she is a necessary or proper party thereto.

5th. That several causes of action have been improperly united herein.

6th. That said complaint does not state facts sufficient to constitute a cause of action in favor of said plaintiff against this defendant.

7th. That no leave to bring this action is shown to have been granted by said United States district court prior to the bringing of the same, or at any time.

8th. That said complaint is ambiguous, unintelligible, and uncertain.

JAMES B. TOWNSEND,
Attorney for John McHenry.

(Endorsed:)
Filed September 11th, 1872.

W'M HARNEY, *Clerk*,
By BERT. McNULTY, *Deputy Clerk*.

35 Service of a copy of the within demurrer of John McHenry is hereby admitted.

San Francisco, Sept. 11th, 1872.

GALLAGHER & PIERSON,
Attorneys for Plaintiff.

Order allowing La Société Française, etc., to proceed with foreclosure.

U. S. district court, district of California.

IN THE MATTER OF THE ESTATE OF JOHN McHENRY, BANKRUPT.

FRIDAY, *October* 4, 1872.

On motion of William M. Pierson, of counsel of "La Société Française d'Epargnes et de Prévoyance Mutuelle," a mortgage creditor of the bankrupt, for an order allowing said corporation to proceed with their action in the district court of the 19th judicial district of the State of California, in and for the city and county of San Francisco, against said bankrupt and his wife, and Montgomery Godley, esq., the assignee herein, et al., now pending for the foreclosure of a mortgage made by said bankrupt to said corporation, which action was commenced on the 16th day of August, A. D. 1872, and E. G. Stetson, esq., counsel for said assignee, being present in open court and consenting thereto:

It is ordered that said motion be, and the same is hereby, granted,
36 provided that no judgment for deficiency in said action be taken by said corporation against said bankrupt or his said assignee.

OGDEN HOFFMAN,
District Judge.

(Endorsed:) Filed October 4, 1872, at 11.10 a. m.

EDWARD B. COTTER, *Clerk*,
By A. D. GRIMWOOD, *Deputy Clerk.*

I, Edward B. Cotter, clerk of the district court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of the order allowing "La Société Française, etc., to proceed with foreclosure," now on file and remaining of record in my office in the cause entitled "In the matter of John McHenry, in bankruptcy, No. 1127."

Attest my hand and seal of said district court, this 8th day of October, A. D. 1872.

[SEAL.]

EDWARD B. COTTER, *Clerk*,
By A. D. GRIMWOOD, *Deputy Clerk.*

(Endorsed:) Filed October 11, 1872.

WILLIAM HARNEY, *Clerk*,
By FRANK F. STONE, *Dep. Clerk.*

Order overruling demurrer of Ellen J. McHenry.

[Title of court and cause.]

December term, Friday, December 13th, 1872. Present, Hon. E. D. Wheeler, judge.

37 The demurrer to the complaint herein (said demurrer being that of Ellen J. McHenry) was this day overruled, with leave to defendants ten days to answer.

Answer of Ellen J. McHenry.

[Title of court and cause.]

And now comes the defendant, Ellen J. McHenry, wife of John McHenry, and for answer to the complaint of said plaintiff, upon her information and belief, says:

(1) That after the adjudication and decree by the United States district court in and for the district of California, that the said John McHenry was a bankrupt, as mentioned and set forth in said complaint, and the appointment of the said Montgomery Godley assignee of said bankrupt, and prior to the filing of said plaintiff's complaint herein, to wit, on the 24th day of June, A. D. 1872, the said plaintiff, through its director and superintendent, Gustave Mahe, proved its debt and claim, founded upon the same identical note and mortgage sued upon in this present action, against the estate of the said bankrupt, John McHenry, before Samuel J. Clarke, j'r, esq., a register in bankruptcy duly appointed by said district court, for the sum of fourteen thousand nine hundred and seventy-one dollars and seventy-four cents, and the same was thereupon allowed as a debt and claim against said estate for that amount.

38 (2) And for a further and separate defence, said defendant says that long prior to and at the date of the note and mortgage mentioned in said complaint, and ever since, the lot of land and premises mentioned in said complaint, with the dwelling-house thereon situated, were and have continued to be the homestead of this defendant and of her family, and that she, with her husband, the said John McHenry and family, have resided thereon continuously from the year 1869 down to the present time, claiming, occupying, and using the same as their homestead.

Wherefore she prays judgment if said plaintiff can maintain this action against her.

JAMES B. TOWNSEND,
Attorney for Ellen J. McHenry.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Ellen McHenry, being duly sworn, deposes and says that she is one of the defendants in the above-entitled action; that she has heard read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that she believes it to be true.

ELLEN J. McHENRY.

Subscribed and sworn to before me this third day of January, A. D. 1873.

ROBERT S. McKEE,
Deputy County Clerk.

39 (Endorsed:) Filed January 3d, 1873.

WILLIAM HARNEY,
Clerk,
By ROBERT S. McKEE,
Deputy Clerk.

Order overruling demurrer of John McHenry.

[Title of court and cause.]

December term, Friday, January 17th, 1873. Present, Hon. E. D. Wheeler, judge.

In this the demurrer to the complaint was this day overruled, and the defendants allowed ten days to answer.

Answer of John McHenry.

[Title of court and cause.]

And now comes the defendant, John McHenry, and for answer to the complaint of said plaintiff, upon his information and belief, says:

That after the adjudication and decree by the United States district court in and for the district of California, that he, the said John McHenry, was a bankrupt, as mentioned and set forth in said complaint, and the appointment of the said Montgomery Godley assignee of said bankrupt, and prior to the filing of the said plaintiff's complaint herein, to wit, on the 24th day of June, A. D. 1872, the said plaintiff proved its debt and claim founded upon the same identical note and mort-
40 gage sued upon in this present action against the estate of the said bankrupt, John McHenry, before Samuel J. Clarke, j'r, esq., (a register in bankruptcy duly appointed by said district court,) for the sum of fourteen thousand nine hundred and seventy-one dollars and seventy-four cents, and the same was thereupon allowed as a debt and claim against said estate for that amount.

Wherefore he prays judgment if said plaintiff can maintain this action against him, and that the same be dismissed with costs.

JAMES B. TOWNSEND,
Att'y for Def't John McHenry.

STATE OF CALIFORNIA,
City and County of San Francisco:

John McHenry, being duly sworn, on his oath, says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

JOHN McHENRY.

Subscribed and sworn to before me this 27th day of January, A. D. 1873.

FRANK F. STONE,
Deputy Clerk.

Filed Jan. 27, 1873.

W'M HARNEY, *Clerk,*
By FRANK F. STONE,
Deputy Clerk.

Service of a copy of the within answer is hereby admitted.
San Francisco, January 27th, 1873.

GALLAGHER & PIERSON,
Attorneys for Plaintiff.

41 *Order to show cause, affidavit, etc.*

[Title of court and cause.]

On reading and filing the annexed affidavit, certificate, and exhibit,
It is ordered that defendants John McHenry and Ellen J. McHenry show cause before this court at the court-room thereof, on Friday, January 31st, 1873, at the opening of the court, or as soon thereafter as counsel can be heard, why the answers of said defendants herein should not be stricken out as sham, irrelevant, and immaterial, and judgment entered for plaintiff, as prayed for in the complaint, and let the said affidavit, certificate, and exhibit, and the papers on file herein, be used on said hearing.
Dated January 29, 1873.

E. D. WHEELER,
District Judge.

(Endorsed:)
I admit service of a copy of the within, this 29th day of January, 1873.

JAMES B. TOWNSEND,
Att'y for Def't.

Filed January 29, 1873.

WILLIAM HARNEY, *Clerk*,
By FRANK F. STONE,
Deputy Clerk.

[Title of court and cause.]

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Charles E. Barry, being duly sworn, says: I am, and have been for several years, a professional searcher of records in the city and
42 county of San Francisco, and familiar, by long acquaintance and examination, with all the records in the county recorder's office of said city and county. I have made a thorough examination of all said records, and find no declaration of homestead on file or of record in said recorder's office executed either by John McHenry or Ellen McHenry, other than the one of which a certified copy is hereto attached.

CHA'S E. BARRY.

Subscribed and sworn to January 29th, 1873, before me.
[SEAL.]

E. V. SUTTER,
Notary Public.

Declaration of homestead by Ellen J. McHenry.

Know all men by these presents that I, Ellen J. McHenry, of the city and county of San Francisco, State of California, do hereby certify and declare that I am married, and that I do now, at the time of making this declaration, reside with my family on the lot of land and premises situate, lying, and being in the city and county of San Francisco, State of California, bounded and described as follows, to wit:
Commencing at a point at the corner formed by the intersection of

the northerly line of Washington street with the westerly line of Taylor street; running thence northerly along said line of Taylor street
43 sixty feet (60); thence at right angles westerly one hundred and twenty-seven feet six inches ($127\frac{6}{12}$); thence at right angles southerly sixty feet (60) to the northerly line of Washington street; running thence easterly along said line of Washington street one hundred and twenty-seven feet and six inches ($127\frac{6}{12}$) to the point of commencement.

Being a portion of fifty (50) vara lot number eight hundred and seventeen. (817.)

And that I, Ellen J. McHenry, have resided with my family on the above-described premises since the 14th day of June, A. D. 1867, and I have used and continued to use and claim the dwelling-house and houses appurtenant, together with the lot of land above described, as my homestead.

That my family consists of a husband and four children and an aged mother, and that it is now my intention to use and claim the said lot of land and premises, together with the dwelling-house thereon and its appurtenances, as a homestead; and I do hereby select and claim the same as a homestead under the provisions of an act of the legislature of the State of California, entitled "An act to exempt the homestead and other property from forced sale in certain cases," passed April twenty-first, one thousand eight hundred and fifty-one, and of the several acts amendatory thereof and supplementary thereof.

In witness whereof I have hereunto set my hand and seal, this twenty-second day of March, A. D. one thousand and seventy-one.

[SEAL.] ELLEN J. McHENRY.

44 Signed, sealed and delivered in the presence of—
FRANK V. SCUDDER.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this first (1) day of June, A. D. one thousand eight hundred and seventy-one, (1871,) before me, Frank V. Scudder, a notary public in and for said city and county, duly commissioned and sworn, personally appeared Ellen J. McHenry, (wife of John McHenry,) whose name is subscribed to the annexed instrument as party thereto, and who is personally known to me to be the individual described therein and who executed the same. And I do hereby certify that she was by me first made acquainted with the contents of said instrument, and thereafter she duly acknowledged to me, on examination separately apart from and without the hearing of her said husband, that she executed the same freely and voluntarily, for the uses and purposes therein mentioned, without fear or compulsion or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] FRANK V. SCUDDER,
Notary Public.

45 A true copy of an original recorded at request of Ellen J. McHenry, June 6, A. D. 1871, at 4 min's past 11 a. m.

W'M L. HIGGINS,
County Recorder.

(22 Homesteads, page 279.)

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, A. R. Hynes, county recorder in and for the city and county of San Francisco, do hereby certify that the annexed is a full, true, and correct copy of an original homestead, as will appear by reference to book 22 of homesteads, page 279, now in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 22d day of January, A. D. 1873.

[SEAL.] A. R. HYNES, *County Recorder*,
Per W. P. MERRIAM, *Deputy*.

This is to certify that the foregoing declaration of homestead, marked "Exhibit A," is the only homestead of record in this office in the name of Ellen J. McHenry, wife of John McHenry.

In witness whereof I hereunto set my hand and affixed my official seal this 28th day of January, A. D. 1873.

[SEAL.] A. R. HYNES, *County Recorder*,
Per W'M P. MERRIAM, *Deputy*.

46 *Order granting motion to strike out answers.*

[Title of court and cause.]

MARCH 14, 1873.

The motion heretofore submitted to strike out the answers to the complaint herein was this day granted, to which ruling of the court the defendants except.

Bill of exceptions of McHenry and wife.

[Title of court and cause.]

Be it remembered, that on the 21st day of February, 1873, the order on defendants McHenry and wife, to show cause why their respective answers herein should not be stricken out, and said plaintiff have judgment herein against them, came on for hearing, and in support of plaintiff's motion to strike out and for judgment, plaintiff read the affidavit of Charles E. Barry, together with the copy of declaration of homestead thereto annexed, the certificate of A. R. Hynes, county recorder of said city and county, thereto annexed, and the order to show cause made by this court, and dated January 29th, 1873, and the admission of service of a copy thereof by defendants' attorney, and the order of the U. S. district court allowing plaintiff to proceed herein, whereupon plaintiff submitted his said motion, no other evidence being offered or given by said plaintiff, except that said complaint and the answers of said defend-
47 ants McHenry and wife were considered as read, and relied upon, whereupon said motion was argued and submitted; and afterwards, on the 14th day of March, A. D. 1873, the court granted said motion, and ordered said answers, and each of them, of said John McHenry and Ellen J. McHenry to be stricken out, and that judgment in favor of said plaintiff against defendants, and each of them, be forthwith entered, subject to the limitation prescribed to said order of the U. S. district court, to which ruling of the court the said defendants John McHenry and Ellen J. McHenry, and each of them, then there excepted, and pray

this, their bill of exceptions, to be signed by the court, which is done accordingly.

E. D. WHEELER, *Judge.*

March 17th, 1873.

(Endorsed :)
Filed March 18, 1873.

WILLIAM HARNEY, *Clerk,*
By BERT. McNULTY, *Deputy.*

Dismissal as to John Doe and Richard Roe.

[Title of court and cause.]

This action is hereby dismissed as to the defendants John Doe and Richard Roe.

San Francisco, March 21, 1873.

GALLAGHER AND PIERSON,
Att'y' for Pl'ff.

48 (Endorsed :)
Filed March 21, 1873.

WM. HARNEY, *Clerk,*
By BERT. McNULTY, *Deputy.*

Decree of foreclosure and sale.

[Title of court and cause.]

IN OPEN COURT.

This action having been this day regularly brought on to be heard, on the complaint and the answers herein of the defendants, John McHenry, Ellen J. McHenry, and William B. Hughes, and upon said complaint taken as confessed by the defendants C. C. Webb and Montgomery Godley, assignee' in bankruptcy of the estate of John McHenry, bankrupt; and it appearing to the court, and the court so finds, that summons has been duly served on said defendants C. C. Webb and Montgomery Godley, assignee' as aforesaid, and that the legal delay for answering the same has expired without any appearance or answer having been filed, and the defaults of said defendants having been duly entered, and the answers of said defendants John McHenry and Ellen J. McHenry having been duly stricken out by the court on motion duly made, as sham and irrelevant, and the answer of said defendant William B. Hughes having admitted all the allegations of said complaint, and prayed that the surplus moneys arising from the sale hereinafter
49 ordered be applied to the payment of the mortgage referred to in said answer, and J. C. Bates, esq., attorney for said defendant, W. B. Hughes, consenting in open court to this decree.

And it appearing in this court from the pleadings and proofs taken herein, and this court so finds, that the said defendant John McHenry, on the eighteenth day of June, A. D. one thousand eight hundred and seventy, (1870,) duly made and delivered to the plaintiff his certain promissory note in writing for the sum of fourteen thousand dollars, in gold coin, as alleged in the complaint herein.

And it further appearing to this court, and this court so finds, that

the said defendant John McHenry, in order to secure the payment of the aforesaid promissory note and the interest to grow due thereon, as alleged in the said complaint, did, at the time and date mentioned therein, execute and deliver to said plaintiff his certain indenture of mortgage, which was duly recorded, as alleged in the complaint, in the county recorder's office of the city and county of San Francisco, State of California, in Liber 298 of Mortgages, page 212.

And it further appearing to this court that by an order duly made by the district court of the United States in and for the district of California, on the 4th day of October, A. D. 1872, and a certified copy whereof was filed in this court on the 11th day of October, A. D. 1872, the said district court of the United States, in the bankruptcy
50 proceedings of the defendant John McHenry, permitted and allowed the plaintiff herein to proceed with this action, and to foreclose the said mortgage in this court, provided said plaintiff should not enter any judgment herein for any deficiency against said defendant John McHenry, or his said estate in bankruptcy; and this action having been dismissed as to the defendants John Doe and Richard Roe.

And it further appearing to this court, and this court so finds, that there is due to the plaintiff on the said promissory note and indenture of mortgage aforesaid the principal sum of fourteen thousand dollars, gold coin of the United States.

And it further appearing to this court, and this court so finds, that there is also due to the plaintiff interest on the said promissory note and mortgage from the eighteenth day of November, A. D. 1871, at the rate of one (1) per cent. per month, to be compounded monthly, payable in like gold coin, said interest amounting at the date of this decree to the sum of two thousand seven hundred and fifty-three $\frac{75}{100}$ dollars, all of said principal and interest together amounting at the date of this decree to the sum of sixteen thousand seven and fifty-three $\frac{75}{100}$ dollars, in gold coin of the United States, and that there is also due to the plaintiff the costs and expenses of this action, taxed at dollars, and counsel-fees, in like gold coin, at the rate of ten per cent. on the amount of said principal and interest, said counsel-fees amounting to the sum of sixteen hundred and seventy-five $\frac{37}{100}$ dollars.

51 And it further appearing to this court, and this court so finds, that notice of the pendency of this action was duly filed in the office of the county recorder of the city and county of San Francisco on the sixteenth day of August, A. D. 1872.

And it further appearing to this court, and this court so finds, that said defendant John McHenry is personally liable for the payment of the said debt, secured by the note and mortgage aforesaid:

Now, therefore, the premises considered, on motion of Gallagher and Pierson, counsel for plaintiff, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority in it vested, doth hereby order, adjudge, and decree that the plaintiff do have and recover from said defendant John McHenry the said principal sum of fourteen thousand dollars, gold coin, of the United States, with interest thereon, as aforesaid, in gold coin, from the eighteenth day of November, A. D. 1871, to date, amounting to twenty-seven hundred and fifty-three $\frac{75}{100}$ dollars. Also with counsel-fees, in gold coin, at the rate of ten per cent. on the amount of said principal and interest, amounting to the sum of sixteen hundred and seventy-five $\frac{37}{100}$ dollars; in all, eighteen thousand four hundred and twenty-nine $\frac{12}{100}$ dollars in gold coin of the United States, together with plaintiff's costs, taxed at one hundred and twenty-seven $\frac{75}{100}$ dollars.

And it is further ordered, adjudged, and decreed that the mort-
52 gaged premises mentioned in the complaint in this action, or so much thereof as may be sufficient to raise the amount due plaintiff, and the costs and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the sheriff of the city and county of San Francisco, for gold coin of the United States, according to the course and practice of this court and the laws relative to the sale of real estate under execution, and that the plaintiff, or any of the parties to this action, may become the purchaser or purchasers at the said sale.

And it is further ordered, adjudged, and decreed that out of the proceeds of the said sale the said sheriff first retain his fees, disbursements, and commissions, and next pay to the plaintiff or its attorneys the costs, expenses, and charges of this foreclosure, as aforesaid, and ten per cent. of the amount due, as aforesaid, for counsel-fees, amounting to the sum of sixteen hundred and seventy-five $\frac{37}{100}$ dollars; and also the sum of sixteen thousand seven hundred and fifty-three $\frac{75}{100}$ dollars, in gold coin of the United States, for principal and interest, together with legal interest on the whole amount found due the plaintiff by this decree, as aforesaid, from the date of this decree, in like gold coin, or so much thereof as said proceeds will pay, and that he take a receipt of the plaintiff or its attorneys for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into
53 the possession of the premises on production of the sheriff's deed, and that the said sheriff report the said sale to this court, and bring the surplus money arising from such sale, if any there be, into this court within five days after the same shall have been received by him, to abide the further order of this court.

And it is further ordered, adjudged, and decreed that the said defendants John McHenry, Ellen J. McHenry, C. C. Webb, William B. Hughes, and Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, and all persons having or claiming to have any lien, right, title, interest, or estate in or to the said mortgaged lands and premises subsequent to the lien of the plaintiff's mortgage, be forever barred and foreclosed of all equity of redemption in and to the said lands and premises, and every part and parcel thereof.

And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the aforesaid sum of eighteen thousand four hundred and twenty-nine $\frac{12}{100}$ dollars and interest, and the costs, expenses, disbursements, and commissions as aforesaid, the said sheriff shall specify such deficiency in his report of sale, but that no judgment for such deficiency shall be entered or docketed against any of the parties to this action.

The description of the lands and premises to be sold by virtue of this decree, as taken from the said mortgage, is as follows, to wit:

54 All that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and described as follows, to wit: commencing at the northwesterly corner of Washington and Taylor streets, running thence northerly along said westerly line of Taylor street sixty (60) feet; thence westerly, at right angles to the last course, one hundred and twenty-seven feet and six inches ($127\frac{6}{12}$ f't) to an alley-way; thence southerly, along the easterly line of said alley-way, sixty (60) feet, to the northerly line of Washington street, and thence easterly, along said northerly line of Washington street, one hundred and twenty-seven feet and six inches ($127\frac{6}{12}$ f't) to the point of commencement.

Being part of fifty-vara lot number eight hundred and seventeen, (817,) as laid down and marked on the official map of the said city and county of San Francisco.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

Decree signed in open court March 21, A. D. 1873.

E. D. WHEELER,
District Judge.

Decree recorded March 26th, A. D. 1873. (Book A, page 268.)

(Endorsed:)
Filed March 21st, 1873.

WILLIAM HARNEY, *Clerk*,
By L. J. LEE, *Deputy Clerk*.

55 *Certificate to judgment roll.*

[Title of court and cause.]

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, William Harney, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the district court of the nineteenth judicial district thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in judgment-book A of said court, at page 268; and I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said cause.

Witness my hand and the seal of said district court this 26th day of March, A. D. 1873.

[SEAL.]

WILLIAM HARNEY, *Clerk*,
By L. J. LEE, *Deputy Clerk*.

(Endorsed:) Judgment-roll.
Filed March 26th, 1873.

[SEAL.]

WILLIAM HARNEY, *Clerk*,
By L. J. LEE, *Deputy Clerk*.

Recorded, judgment-book A, page 268.

Order fixing amount of undertaking on appeal.

[Title of court and cause.]

On application of the defendants John McHenry and Ellen J. McHenry, his wife, the sum of six hundred dollars, in United States coin, is hereby fixed as the amount of the undertaking to be given
56 by them on appeal from the judgment of this court herein to the supreme court of the State of California, conditioned that during the possession by them of the real property mentioned in the judgment herein they will not commit nor suffer to be committed any waste thereon, and that if the judgment of this court be affirmed, or their said appeal be dismissed, they will pay the value of the use and occupation of said property from the time of the appeal until the delivery of possession pursuant to said judgment.

Dated at San Francisco this 4th day of April, A. D. 1873.

E. D. WHEELER, *Judge*.

(Endorsed:)
Filed May 6th, 1873.

WILLIAM HARNEY, *Clerk*,
By F. F. STONE, *Dep. Clerk*.

Notice of appeal by John McHenry and Ellen J. McHenry.

[Title of court and cause.]

You will please take notice that John McHenry and Ellen J. McHenry, defendants in the above-entitled action, hereby appeal to the supreme court of this State from the judgment therein made and entered in the said district court on the 21st day of March, A. D. 1873, in favor of the plaintiff in said action, and against said appellants, (and others,) and from the whole thereof.

57 Dated this 6th day of May, A. D. 1873.

Yours, etc.,

JAMES B. TOWNSEND,
Attorney for defendants John McHenry and Ellen J. McHenry.

To the clerk of said district court, and T. J. Gallagher, esq., attorney for plaintiff.

(Endorsed :)

Service of the within notice of appeal is hereby admitted, this 6th day of May, A. D. 1873.

T. J. GALLAGHER,
Pl'ff's Att'y.

Filed May 6th, 1873.

W'M HARNEY, *Clerk*,
By F. F. STONE, *Deputy Clerk*.

Undertaking on appeal.

[Title of court and cause.]

Whereas the said appellants in this action above named have appealed to the supreme court of the State of California from a judgment made and entered against them in said action in the said district court, in favor of the above-named respondent, on or about the 21st day of March, A. D. 1873, for the foreclosure and sale of certain mortgaged premises, therein particularly described, and the payment to said respondent, out of the proceeds thereof, of the sum of $18,429.12, or thereabouts, in gold coin of the United States, together with respondent's costs, taxed at $127.75 :

58 Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, Edward W. Willett, of the city and county of San Francisco, and Robert Battersby, of the same place, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of six hundred dollars, being the amount fixed therefor by the judge of this court, that, during the possession by them of the real property mentioned in the judgment herein, they will not commit, nor suffer to be committed, any waste thereon, and that if the judgment of this court be affirmed, or their said appeal

be dismissed, they will pay the value of the use and occupation of said property from the time of the appeal until the delivery of possession, pursuant to said judgment.

Dated at San Francisco this 6th day of May, A. D. 1873.

ED. W. WILLETT.
ROB'T BATTERSBY.

59 CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Edward W. Willett and Robert Battersby, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, say, and each for himself deposes and says, that he is worth double the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

EDWARD W. WILLETT.
ROB'T BATTERSBY.

Subscribed and sworn to before me this 6th day of May, A. D. 1873.

FRANK F. STONE,
Deputy Co. Clerk.

(Endorsed:)
Filed May 6th, 1873.

W'M HARNEY, *Clerk*,
By F. F. STONE, *Dep. Clerk.*

Affidavit and order on sheriff to show cause.

[Title of court and cause.]

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Thomas J. Gallagher, being sworn, says: I am plaintiff's attorney herein. An order of sale was issued herein on the 26th day of March, 1873, commanding the sheriff of this county to sell the mortgaged premises described in the complaint. He duly advertised the same for sale, and the day of sale was fixed for the 8th day of May inst. On
60 that day he refused to sell, upon the ground that he had been notified by the defendants that an appeal was pending herein, and a sufficient bond had been given by defendants to stay proceedings. In order to save expense of a new publication, I then directed said sheriff to adjourn said sale to the 19th May inst., but said sheriff threatens that he will not sell on that day for the same reason. I am advised, upon examination of the undertaking on appeal herein, that the same is not sufficient to stay said sale.

T. J. GALLAGHER.

Subscribed and sworn to May 15th, 1873, before me.
[SEAL.] E. V. SUTTER,
Notary Public.

On reading and filing foregoing affidavit and undertaking on appeal herein, it is ordered that the sheriff of the city and county of San Francisco show cause before this court on Friday, May 16th inst., at the court-room of this court, in said city and county, at the opening of this court, or as soon thereafter as counsel can be heard, why he should not sell the mortgaged premises herein, as commanded by the decree and

order of sale issued herein, on the 19th day of May inst., the day to which said sale is adjourned; and on the hearing hereof, let the papers on file, and the foregoing affidavit and this order, be used and read.

Dated May 15th, A. D. 1873.

CHARLES A. LOW,
Court Commissioner.

61 (Endorsed:)

Due service of a copy of the within affidavit and order to show cause.

JAMES ADAMS,
By H. D. LAMMOTT,
Under-Sheriff.

MAY 15, 1873.

Order on sheriff to proceed with sale of mortgaged premises.

[Title of court and cause.]

The order to show cause on the sheriff of the city and county of San Francisco why he should not proceed with the sale of the mortgaged premises herein, as directed by the order of sale heretofore issued, having been heard and considered:

It is hereby ordered that the said sheriff proceed with said sale on this Monday, May 26, 1873.

E. D. WHEELER,
District Judge.

MAY 26TH, 1873.

(Endorsed:)
Filed May 26th, 1873.

WILLIAM HARNEY, *Clerk*,
F. F. STONE, *Dep. Clerk.*

Bill of exceptions to making of order on sheriff.

[Title of court and cause.]

Be it remembered that on the 16th day of May, A. D. 1873, the
62 said plaintiff moved the court for an order on the sheriff directing him to proceed and sell the mortgaged premises mentioned in the judgment herein, notwithstanding the appeal taken and undertakings on appeal filed herein by said defendants John McHenry and Ellen J. McHenry; and said plaintiff read, in support of his said motion, the affidavit of T. J. Gallagher, purporting to have been sworn to May 15th, 1873, before E. V. Sutter, notary public, and the order made May 15th, 1873, by Cha's A. Low, court commissioner, on the sheriff of said city and county, to show cause why he should not sell said mortgaged premises, and the memorandum of service thereof dated May 15th, 1873, thereon endorsed, which affidavit, order to show cause, and memorandum of service are hereby referred to and made part of this bill of exceptions.

After the submission of said motion, and some ten days before the decision thereon, the judge of said court informed the attorney of said McHenry and wife of said motion, and called his attention to the authorities relied upon by plaintiff's attorney in support of said motion.

No proof was offered or made that any notice of the making of this motion had been given to said defendants, John McHenry or Ellen J.

McHenry, or to their attorney herein. Said motion was, upon the above-mentioned papers, submitted to the court for decision, and thereafter, on the 26th day of May, A. D. 1873, the honorable judge of this
63 court, at chambers, made an order upon the said sheriff that he proceed and sell said mortgaged premises, which order is now on file herein, and is hereby referred to and made part of this bill of exceptions.

Neither the defendants John McHenry nor Ellen J. McHenry, nor their attorney, was present at the making of said motion, nor at the making of said order.

The defendants John McHenry and Ellen J. McHenry except to the making of said order requiring said sheriff to sell said mortgaged premises, and pray that this, their bill of exceptions, be signed by the judge of this court and made part of the record herein, which is done accordingly.

E. D. WHEELER,
Judge.

JUNE 5TH, 1873.

(Endorsed:) Filed June 5th, 1873.

W'M HARNEY, *Clerk*,
By F. F. STONE, *Deputy Clerk.*

Notice of appeal from order made after judgment.

[Title of court and cause.]

You will please take notice that John McHenry and Ellen J. McHenry, defendants in the above-entitled action, hereby appeal to the
64 supreme court of this State from the order on the sheriff of said city and county, that he proceed with the sale of the mortgaged premises herein made by the judge of said district court, and filed herein on the 26th day of May, A. D. 1873, and from the whole thereof.

Dated at San Francisco this 10th day of June, A. D. 1873.

Yours, &c.,

JAMES B. TOWNSEND,
Attorney for Appellants.

To the clerk of said district court, and T. J. Gallagher, esq., attorney for respondent.

(Endorsed:) Filed June 10th, 1873.

W'M HARNEY, *Clerk*,
By F. F. STONE, *Dep. Clerk.*

Due service of a copy of the within notice of appeal is hereby admitted this 10th day of June, A. D. 1873.

T. J. GALLAGHER,
Per PIERSON,
Attorney for Respondent.

Undertaking for costs and damages on appeal.

[Title of court *of* cause.]

Whereas the said John McHenry and Ellen J. McHenry, defendants in the above entitled action, have appealed to the supreme court of the State of California from an order on the sheriff of said city and county

that he proceed with the sale of the mortgaged premises herein,
65 made by the judge of said district court, and filed in said action in said district court on the 26th day of May, A. D. 1873:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, Robert Battersby, of the city and county of San Francisco, and James B. Townsend, of the same place, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 10th day of June, A. D. 1873.

ROB'T BATTERSBY. [SEAL.]
JAMES B. TOWNSEND. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Robert Battersby and James B. Townsend, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within this State.

ROB'T BATTERSBY.
JAMES B. TOWNSEND.

66 Subscribed and sworn to before me this tenth day of June, A. D. 1873.

FRANK F. STONE,
Dep. Co. Clerk.

(Endorsed:)
Filed June 10th, 1873.

W'M HARNEY, *Clerk*,
By FRANK F. STONE, *Deputy Clerk.*

In the district court of the 19th judicial district of the State of California, in and for the city and county of San Francisco, State of California.

LA SOCIÉTÉ FRANÇAISE D'EPARGNES ET DE Prévoyance Mutuelle, plaintiff,
vs.
JOHN MCHENRY, ELLEN J. MCHENRY, AND others, defendants.

Clerk's certificate.

I, William Harney, county clerk of the city and county of San Francisco, and ex-officio clerk of the district court of the 19th judicial district of the State of California, in and for the city and county of San
67 Francisco, do hereby certify the foregoing to be full, true, and correct copies of their respective originals, now on file and of record in my office in the foregoing-entitled action, and of the whole thereof, and that I have compared the same with the original thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said 19th district court at said city and county this 14th day of June, A. D. 1873.

[SEAL of 19TH DISTRICT COURT.]
[L. S.]

W'M HARNEY, *Clerk*,
By FRANK F. STONE, *Deputy Clerk.*

68 (Duplicate.)

In the supreme court of the State of California, October term, A. D. 1874.

La Société Française d'Epargnes et de Prévoyance Mutuelle, respondent, *vs.* John McHenry and Ellen J. McHenry, appellants.	3840. On appeal from the district court of the 19th judicial district, in and for the county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Wallace, C. J., McKinstry, J., and Crockett, J., concurring.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order of the district court of the 19th judicial district, in and for the county of San Francisco, in the above-entitled cause, be, and the same is hereby, affirmed, with costs.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 7th day of November, A. D. 1874, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 11th day of November, A. D. 1874.

[SEAL.] GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

(Indorsed:) No. 3840. In the supreme court, State of California. Remittitur. vs. . Clerk's costs, $. Paid by appellant, $; paid by respond't, $; total, $. , clerk, by , deputy.

69 In the Supreme Court of the United States of America.

John McHenry et al. *vs.* La Société Française d'Epargnes et de Prévoyance Mutuelle.	

Know all men by these presents that we, George O. Davis & Robert Battersby, are held and firmly bound unto La Société Française d'Epargnes et de Prévoyance Mutelle, a corporation duly incorporated under the laws of the State of California, in the sum of one thousand ($1,000) dollars, to be paid to the said La Société Française d'Epargnes et de Prévoyance Mutuelle, its successor or successors; to which payment well and truly to be made we bind ourselves and each
70 of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 17th day of November, A. D. 1874.

Whereas John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, and Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, have prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the district court of

the 19th judicial district of the State of California, in and for the city and county of San Francisco, which said judgment has been affirmed by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such, that if the above-named John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, and Montgomery Godley, assignee in bankruptcy, shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then
71 this obligation shall be void, otherwise to remain in full force and virtue.

GEO. O. DAVIS.
ROB. BATTERSBY.

Signed, sealed, and delivered in presence of—
PHILIP MAHLER.

UNITED STATES OF AMERICA,
State of California:

George O. Davis and Robert Battersby, being duly sworn, each for himself deposes and says that he is one of the sureties on the foregoing bond; that he is a freeholder in said State, and is worth the sum of one thousand dollars exclusive of property exempt from execution, and over and above all debts and liabilities.

GEO. O. DAVIS.
ROB'T BATTERSBY.

Subscribed and sworn to before me this 17th day of November, A. D. 1874.

[SEAL.] PHILIP MAHLER,
Notary Public.

(Indorsed:)

The within bond is approved by me this 17th day of November, 1874.
W'M T. WALLACE,
Chief-Justice.

Filed November 17th, 1874.
GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy.*

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, and Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, are plaintiffs in error, and La Société Française d'Epargnes et de Prévoyance Mutuelle, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] Attest, &c. L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

73 The within writ of error is allowed, and, upon filing same with this court this day, will operate as a supersedeas.

WALLACE, *C. J.*

SAN FRANCISCO, NOV, 17TH, 1874.

The answer of the justices of the supreme court of the State of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

Clerk.

(Indorsed:) 3840. United States Supreme Court. Jno. McHenry & al. vs. La Société Française d'Epargnes et de Prévoyance Mutuelle. Writ of error. Filed November 17th, 1874. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

74 (Copy.)

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

James P. Dameron, of lawful age, being duly sworn, on his oath states that he served the foregoing citation on the therein-mentioned La Société Française d'Estargnes et de Prévoyance Mutuelle, by delivering to and leaving with T. J. Gallagher, the attorney of record for the La Société Française, &c., in the action mentioned in said citation, a true copy of said citation, within said city & county of San Francisco, on the thirteenth day of November, A. D. 1874, and that this affiant has no interest whatever in the result of said action.

JAMES P. DAMERON.

Sworn to & subscribed before me on this the 30th day of Dec., 1874.
R. AUG. THOMPSON,
Justice of the Peace.

75 (Copy.)

UNITED STATES OF AMERICA, *ss:*

To La Société Française d'Espargnes et de Prévoyance Mutuelle, a corporation duly incorporated under the laws of the State of California, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of California, wherein John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, and Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, bankrupt, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, this 17th day of November, A. D. 1874, and of the Independence of the United States the ninety-ninth.

WM T. WALLACE,
Chief-Justice of the Supreme Court of the State of California.

(Indorsed:) 3840. United States Supreme Court. Jno. McHenry et al. vs. La Société Française d'Ep. et de Pr. Mutuelle. Citation. Filed November 17th, 1874. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

76 In the Supreme Court of the United States.

JOHN MCHENRY & ELLEN J. MCHENRY, plaintiffs in error,
vs.
LA SOCIÉTÉ FRANÇAISE d'EPARGNES ET DE Prévoyance Mutuelle, defendants in error.

And now come the said plaintiffs in error and say that in the record and proceedings of the said supreme court of the State of California in said cause, and in the giving of judgement therein, there is manifest error, in this, to wit: That the said supreme court of the State of *of* California gave judgement against said plaintiffs in error, whereas, by the law of the land, its judgement should have been in favor of said plaintiffs in error and against said defendants in error.

And the said plaintiffs in error pray that the judgement aforesaid, for the error aforesaid and other errors in the said record and pro-
77 ceedings appearing, may be reversed, annulled, and for naught held; and that they be restored to all things which they have lost thereby, and that such judgement be rendered herein as the said supreme court of the State of California ought to have rendered, and that they recover their costs herein expended.

JAMES B. TOWNSEND,
Attorney for Plaintiffs in Error.

(Indorsed:) In the Supreme Court of the United States of America. John McHenry & Ellen J. McHenry, pl'ffs in error, vs. La Société

Française d'Epargnes et de Prévoyance Mutuelle, d'f'ts in error. Assignment of errors.

78 In the supreme court of the State of California.

JOHN MCHENRY ET AL.
v.
LA SOCIÉTÉ FRANÇAISE D'EPARGNES ET DE Prévoyance Mutuelle. } No. 3840.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify the foregoing and annexed to be the original writ of error and the original bond; also full, true, and correct copies of the transcript, the judgment of the court, and the citation in the above-mentioned cause, as the same appears of record and on file in my office.

Witness whereof I hereunto set my hand and affix the seal of our supreme court, at my office in the city and county of San Francisco, on this the 31st day of December, A. D. 1874.

[SEAL.] GRANT I. TAGGART, *Clerk.*

(Indorsement on cover:) No. 45. John McHenry, Ellen J. McHenry, his wife, C. C. Webb, W'm B. Hughes, and Montgomery Godley, assignee in bankruptcy of the estate of John McHenry, a bankrupt, plaintiffs in error, v. La Société Française d'Epargnes et de Prévoyance Mutuelle. California sup. ct. Filed 29th January, 1875.

Supreme Court of the United States,

October Term, 1877.

JOHN McHENRY AND ELLEN J., HIS WIFE,
APPELLANTS,
vs.
LA SOCIÉTÉ FRANÇAISE D'ÉPARGNES ET DE PRÉVOYANCE MUTUELLE.

No. 45.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

FIRST. *June* 18, 1870. John McHenry became indebted to La Société Française in the sum of fourteen thousand dollars, gold, for which he gave his promissory note for the like amount and date, at twelve months, without grace, with interest at one per cent. payable monthly in advance, and if not paid in advance to be added to the principal; and if default continued for ten days, the principal to become immediately due and payable.

To secure this note, McHenry mortgaged lot No. 817 in the city of San Francisco. His wife was no party either to the note or mortgage.

Rec., pp. 5, 6, 7, 8.

SECOND. *March* 22, 1871. Ellen J. McHenry, wife of John McHenry, made declaration of homestead, embracing the said lot No. 817, which, she alleged, she had occupied as a residence and homestead since June 14, 1867, and that her family consisted of husband, four children, and an aged mother. (Rec., p. 18 *et seq.*) Recorded June 6, 1871.

THIRD. *February* 6, 1872. McHenry and wife mortgaged the same property for $1,500, payable one month after date, with interest at 1¼ per cent. from date till paid, &c.

Rec., p. 12.

FOURTH. *March* 20, 1872. John McHenry was decreed a bankrupt in the United States district court for district of California.

Rec., p. 3.

FIFTH. *June* 24, 1872. La Société Française proved its mortgage debt against John McHenry in the bankruptcy proceedings before the register for $14,971.74, and the same was allowed as a debt and claim against said bankruptcy.

See the demurrers, Rec., pp. 13, 14.

SIXTH. *August* 15, 1872. La Société Française brought suit in the district court of the nineteenth judicial district of California, in and for the city and county of San Francisco, against John McHenry, Ellen J. McHenry, his wife, C. C. Webb, William B. Hughes, Montgomery Godley, assignee in bankruptcy of John McHenry, bankrupt, in order to foreclose the mortgage.

The mortgage-creditor prays for judgment against the said Montgomery Godley, assignee of John McHenry, for

principal, interest, interest compounded monthly, insurance with interest at two per cent. per month, and ten per cent. on the amount of said principal and interest for counsel fees and costs, "*all in like gold coin.*" That the usual decree for forfeiture be entered, and for sale of the mortgaged property to pay the judgment aforesaid, or so much thereof as said proceeds will pay, and if proceeds insufficient then for judgment and execution for the deficiency *against M. Godley, assignee* of John McHenry. And that all the defendants and all other persons, &c., having liens, &c., be forever barred of all equity of redemption therein, &c., &c.

Rec., pp. 1 to 9.

SEVENTH. *September* 3, 1872. Ellen J. McHenry demurs to the plaintiff's petition, and on September 11, 1872, her husband, John McHenry, does the like.

Record, pp. 13, 14.

EIGHTH. *October* 4, 1872. In the bankruptcy court WHILST THE DEMURRERS WERE PENDING, La Société Française obtained an order, E. G. Stitson, Esq., counsel for said assignee, being present in open court and consenting thereto, permitting the said corporation to proceed with their action in the district court of the 19th judicial district, &c., against said bankrupt, John McHenry, and his wife, and his assignee, Godley, for the foreclosure of a mortgage made August 15, 1872.

Rec., p. 15.

NINTH. *December* 13, 1872. Mrs. Ellen J. McHenry's demurrer was overruled; and a few days after, January 3, 1873, she filed her answer, in which she set forth, 1st, the

corporation's proof of indebtedness against John McHenry of June 24, 1872; and, 2d, that the property was her homestead for self and family.

Rec., p. 16.

TENTH. *January* 17, 1873. John McHenry's demurrer was overruled; and a few days after, January 17, 1873, he filed his answer, setting forth the corporation's proof of debt in his bankruptcy proceedings, and prays judgment if said plaintiff, La Société Française, can maintain this action against him, and for a dismissal of the action with costs.

Rec., p. 17.

ELEVENTH. *January* 29, 1873. On an affidavit and suggestion that defendant's answers were "*sham, irrelevant,* "*and immaterial,*" La Société Française obtained a rule on McHenry and wife to show cause why judgment should not be entered for plaintiff as prayed for in the complaint, &c.

Record, pp. 18, 19.

[The affidavit is as to the declaration of homestead set forth above in second item.]

TWELFTH. *March* 14, 1873. This rule was made absolute, and judgment entered, after reciting certain premises, *against John McHenry* for $14,000, interest, compound interest, insurance, and 10 per cent. counsel fees, in all $18,429.12, in gold, and $127.75 taxed costs. That the property be sold at public auction by or under the direction of *sheriff of San Francisco,* "according to the course "and practice of this court and *the laws relative to the sale* "*of real estate* UNDER EXECUTION, and that plaintiff, or any "of the parties to this action, may become the purchaser

" at this sale." Out of the proceeds of this judicial sale the court ordered to be paid—

(*a.*) To the sheriff, his fees, disbursements, and commissions;

(*b.*) To the plaintiff or his attorney, the costs, expenses, and charges of this foreclosure, as aforesaid, " and ten per " cent. of the amount due as aforesaid for counsel fees, " amounting to the sum of $1,675.37;"

(*c.*) And also the sum of $16,753.75 for principal and interest, &c., &c.

That the purchaser at said sale be let into possession on production of sheriff's deed; that he report said sale and bring the surplus money, if any, into court within five days, &c., to abide the further order of this court; and that all the world be barred of all equity of redemption. If sale insufficient to pay $18,429.12, and " *interest, costs, expenses,* " *disbursements,* and *commissions,*" sheriff shall specify such deficiency in his report of sale, but that no judgment for such deficiency shall be entered or docketed against any of the parties to this action. [*Compare decree with complaint.*]

Record, p. 21 *et seq.*

THIRTEENTH. *March* 21, 1873. Decree signed in open court and recorded March 26, 1873, (Rec., p. 24,) and on March 26, 1873, an order of sale was issued to the sheriff.

Rec., p. 26.

FOURTEENTH. *April* 4, 1873. A *supersedeas* appeal was granted to John McHenry and wife.

Record, p. 24.

FIFTEENTH. *May* 15, 1873. A rule was granted on the sheriff to show cause why he should not proceed with the sale. It is signed "Charles A. Low, court commissioner."

Record, p. 26.

SIXTEENTH. *May* 26, 1873. The court made the rule absolute on the very day of the sale. No notice whatever was given to McHenry and wife or their attorney, *except* "the judge of said court informed the attorney of said "McHenry and wife of said motion, and called his attention to the authorities relied upon by plaintiff's attorney "in support of said motion."

Rec., p. 27.

SEVENTEENTH. *June* 10, 1873. McHenry and wife appeal from this judgment making rule for sale absolute to the supreme court of California, where the judgments of the lower court were affirmed.

McHenry *vs.* Société d'Epargnes, 49 California, 351.

And McHenry and wife are plaintiffs in error here, under R. S. 709.

ASSIGNMENT OF ERRORS.

1st. Both the California courts that passed upon this case were without jurisdiction, and their decrees and proceedings nullities from the beginning.

2d. The demurrers to the complaint were illegally overruled.

3d. The answers did present an available defence and should not have been stricken out; and even if they pre-

sented no available defence, still the court erred in its action thereon, and should have heard evidence and argument of counsel.

4th. The court below erred because it could not determine the effect of its decree in selling McHenry's property; and it is immaterial whether or not there is any *personal* judgment against him.

5th. The order of the United States district court, district of California, dated October 4, 1872, allowing La Société Française, after proof of its claim in bankruptcy, to proceed with its action in the State court for the city and county of San Francisco against said bankrupt, John McHenry, and wife, and the assignee *et al.*, for the foreclosure of a mortgage, which action was commenced August 16, 1872, is ABSOLUTELY VOID.

ARGUMENT.

The regulation of commerce and its indispensable correlative, the establishment of a uniform system of bankrupt laws, were powers wisely entrusted to the Legislative Department of the Union. They are necessarily paramount. They overrule both the jurisdiction and judicial power of the State courts in all cases where any controversy upon these matters arise. Indeed, it is too clear for argument that the admiralty jurisdiction, the bankruptcy jurisdiction, and all the criminal jurisdiction of these national courts, under the provisions of the Constitution, are and must be EXCLUSIVE. "Thirty-seven State supreme courts passing "upon the various provisions of the United States bank- "rupt act, and interpreting liens under the State laws with- "out regard to the provisions of the national law, would "be an intolerable administration of a really beneficent

" but most unpopular system of law." The argument returns to us in many cases, which point out the delay, the circuity of action under the United States Revised Statutes; the vast expense, the large additional labor imposed upon this court, and the discord of opinions in the State courts in arbitrary and anomalous, and, therefore, unjust judgments, all which so grievously impair the workings of the law.

The present writ of error shows the truth of this argument in a remarkable manner. Indeed, the most prominent features of the United States bankrupt system, as of all other bankrupt systems, are equality among creditors; the debtor's property the common pledge of all the creditors; rapidity of procedure, and diminution of expenses in the liquidation of the bankruptcy. The judgment in this case disturbs the equality of creditors by withdrawing the proceedings entirely from their supervision and control; it displaces the common pledge by taking it away from its appropriate jurisdiction; it greatly retards the bankrupt proceedings; it grossly exaggerates and inflames the expenses.

But these features of the case are absorbed in one predominant characteristic: the United States bankrupt judge laid down his jurisdiction at the portals of the State court; and by his judgment PERMITTING La Société Française to foreclose their mortgage *there*, virtually proclaimed to the world his own lack of judicial power to foreclose a mortgage where all the parties thereto and the subject-matter were regularly before him, acknowledging his jurisdiction. What would be thought of an admiralty judge who, when a ship and all its creditors were regularly before him, would ASSENT to a transfer to a State court in order to obtain a foreclosure of the mortgage upon the ship?

Or of a circuit judge sending to the State court for trial

a person charged with counterfeiting legal tender or United States silver coin? Or sending "*executory process*," where he had the persons and property all before him, to a State court for execution?

Erwin *vs.* Lowry, 7 How., 179.

It is an inconsistency in the judicial office when the judge delegates or attempts to delegate the performance of his official duties, imposed upon him personally by the law, to the judge of another and, in many respects, a foreign and antagonistic jurisdiction; *a fortiori*, when the proceedings are the simplest in the law, a foreclosure of a mortgage by an *in rem* suit, where almost all the work is executive and done by the ministerial officers of the court, and the judge is only required to superintend the proceedings.

Nor can there be a doubt that a bankruptcy is a *universitas juris* and a proceeding *in rem*, to which all the world are parties either by publication or otherwise. Such a proceeding must necessarily draw all conflicting interests within its own proper and *exclusive* sphere. In the *concurso* of creditors, each creditor is plaintiff and defendant; their respective rights are determined contradictorily, and the fullest latitude of attack and defence *inter se* is afforded. How, then, can a State court be permitted to isolate one portion of the real-estate of the bankrupt and administer that portion only, thus having as many *universitates juris* as there are pieces of real property? R. S., 711: "All mat-" ters and proceedings in bankruptcy." (See the reasoning in 3 Otto, 133 *et seq.*) But though our proposition of law is extremely plain, yet we see the multitudinous objections made to it. The air of overweening confidence with which it is treated as "sham, irrelevant, and immaterial" was eminently successful with the lower courts, and is both striking and suggestive. It is evidently impossible by any

such means to frighten off the generality of suitors from resorting to the appellate jurisdiction of this court. *Such action is error apparent on the face of the record.*

Fuller *vs.* Claflin, 3 Otto, 15.

The *first objection* made is that McHenry and wife have no interest in this suit.

(*a.*) *As to McHenry.* He was properly made a party; for, otherwise, the suit would be *against the assignee;* and not only illegal, but an actual contempt of the bankruptcy court. See the discordance between the prayer of the petition and the judgment rendered upon it.

Thompson *vs.* Scott, Wash. Law Rep., Nov. 25, 1876.
Wiswall *vs.* Sampson, 14 Howard, 52.

And McHenry had a substantial interest as owner. The effect of the bankruptcy proceedings was not to *vest in the creditors the ownership* of the bankrupt's property, but merely *the right to sell it* and pay themselves. They could not, by any lapse of time, acquire the ownership by means of the bankrupt proceedings. *A fortiori*, their assignee could not.

Re Grunsill, L. R., 8 C. P, 24.
4 Reeves' English Law, 254.
Hampton *vs.* Rouse, 22 Wall., 273.

As bankrupt, McHenry was agent and trustee of all his creditors, and it was his legal duty to watch over the proceedings in their as well as in his own interest.

R. S. U. S., sec. 5110, par. second.

Besides, until the property is legally sold, his right of

redemption exists in full force and virtue. Indeed, the only true and scientific legal relation between McHenry and his creditors is that of pledgor and pledgee. All McHenry's creditors are pledgees, *La Société Française*, just as well as the ordinary or merely chirographary creditors. But with this distinction: the rights of *La Société Française* are to be tested by the date of their hypothecary contract with the insolvent; the rights of ordinary creditors by the date of the filing of the petition by the bankrupt. It is a simple case of *a general execution on a mass of property, at a certain point of time*, belonging to a party temporarily unable to pay his debts. The interest of the bankrupt, *as owner*, is undeniable.

The English courts are slowly but surely advancing on the true doctrine.

Ex parte Austin, L. R., 4 Ch. D., 13.

The bankrupt's interest is to pay his creditors at least thirty per cent. that he may get his discharge. (R. S., 5112, and amendment, 18 S. L., 180.) He is, therefore, directly interested in the legal and honest administration of his surrendered assets. The law will not coerce him to keep still whilst his property is being absorbed in illegal costs, disbursements, and commissions, as in this case; and they directly deprive him of his discharge, whilst, indirectly, operating a repeal of some of the provisions of the statutes of bankruptcy.

(*b.*) *As to Mrs. McHenry.* She claimed a homestead interest in the real estate in controversy.

Admitting, for the sake of argument only, that her claim was entirely subordinate to that of the Société Française, still she had a direct interest in having the claim of that corporation reduced to the lowest amount possible.

Now, the facts show that the Society made proof of indebtedness against McHenry in bankruptcy, June 24, 1872, for $14,971\frac{74}{100}$; and this indebtedness is in the present record expanded into a judgment of the State court of California for $18,429\frac{12}{100}$ in gold, and $127\frac{75}{100}$ costs, and the property ordered to be sold by the sheriff to pay the same, "*and interest, costs, expenses, disbursements, and commissions;*" and all this was done under the order of the United States district court in California! And when we complain, our allegations are treated as "sham, irrelevant, and immaterial."

Mandelbaum *vs.* The People, 18 Wall., 310.
Hozey *vs.* Buchanan, 16 Peters, 215.

The second objection is that there is no personal judgment against McHenry. This overlooks the character of the action *in rem;* and here the proceedings in bankruptcy as well as the foreclosure of mortgage are proceedings *in rem.* Indeed, on reference to the complaint, (Rec., p. 1,) it will be found the prayer is for judgment against the assignee for the amount of the indebtedness, and against McHenry and wife "and all other persons," that they "may be forever barred and foreclosed of all equity of redemption," &c. The proceedings are very anomalous; so much so, indeed, as not to be sustained, except in the *off-hand* way adopted by the lower court. Can it be that the judges of the State court conceived themselves without judicial power to decree as nullities the bankrupt proceedings *in rem* of a national court, either directly or collaterally, on any ground whatever? This was one of the questions raised and decided in Ray *vs.* Norsworthy, hereafter cited.

We conceive it very material that the bankrupt's property surrendered to his creditors should be sold so as to

realize as large a price as possible, and with as few costs. This is the real interest of the creditors and of the bankrupt. To attain this end is of the very essence of all bankrupt laws.

Here we have a forced sale; a sale under execution; a compulsory transfer of property by the sheriff. "*Such* "*sales are considered, both at law and in equity, as sacri-* "*fices of property.*" There is not the slightest doubt that a sale, made by order of the United States district court, on the application of the assignee, by a public auctioneer, with all parties, as in this case, before the bankrupt court, would produce much more money than a sheriff's sale. "It is "not enough that a court of equity" (*a fortiori*, a national court sitting in bankruptcy) "causes nothing but the in- "terest of the proper parties to change owners. Its decree "should terminate, not instigate, litigation. Its sales "should tempt men to sober investments, and not to wild "speculation. Its process should act upon known and "definite interests, and not upon such as admit of no me- "dium of estimation. It has the means of reducing every "right to certainty and precision, and is therefore bound "to employ those means in the exercise of its jurisdiction."

Caldwell *vs.* Taggart, 4 Peters, 202.

"The bankrupt law, conceived and enacted in the belief "that it provided the best mode of administering the es- "tate of an insolvent, will tolerate no attempt by individ- "uals to devise and carry into effect some other plan in- "consistent therewith, nor permit such an attempt to be "justified by the excuse that they *thought* such other plan "wiser or better."

Cookingham *vs.* Morgan, 7 Blatchf., 482.

A sale by authority of justice, a judicial sale should not be "a lottery at the bidding, and the source of confusion "and strife afterwards."

But when *La Société Française* made itself a party to the bankruptcy proceedings, and proved its debt, it became OF RECORD a judgment-creditor of the bankrupt, exactly like every other creditor on the schedule making similar proof. The amount of its claim upon the bankrupt was ascertained and fixed. After that time the anatocism in the original contract could not be continued or enforced in any United States court sitting in bankruptcy, equity, or common law. It is idle to say that the contract being legal when and where made, must be enforced. No national court can enforce a contract for compound interest, or continue any rate over six *per cent. per annum* on any judgment which merges the contract, (U. S. Rev. Stat, 966,) *unless* the State laws expressly provide for it, which they never can do, in bankruptcy proceedings.

The judgment of record resulting from proof of its claim by the *Société Française*, June 24, 1872, even under California laws, is conclusive against all the creditor's pretensions in this case. (California Code, 1918, 1920.) "No judg- "ment in any court of this State shall draw interest at "a rate to exceed seven per cent. per annum. *Interest* "*must not be compounded in any manner or form on a* "*judgment.*"

See Statutes of California for 1870, p. 699, sec. 1.

Anatocism and usury cease to afflict debtors in that State after both *natural* and *civil* death.

Ellis *vs.* Polhemus, 27 California, 350.

The gist of McHenry's objection is that his property is

illegally encumbered with liens and privileges to the prejudice, firstly of his creditors, and lastly of himself. Many a contingency incident to human life might enable him to pay off all his creditors, put a summary termination to his bankruptcy proceedings, and re-acquire all his real property surrendered. *He is no involuntary bankrupt.*

The entire proceeding from the beginning is at variance with the provisions of law provided for in these cases. (R. S., 5075.) It looks like absurdity to say that the value of this real estate, "to be ascertained by a sale thereof to "be made in such manner as the [bankrupt] court shall "direct," is to be determined by the proceedings of a State court, and *a forced sale by its sheriff!* (See also R. S., 5062, 5063.) The power of the bankrupt court to order a sale is decided, and all objections to the power examined and overruled, in

Ray *vs.* Norseworthy, 23 Wall., 135.

And this power to sell is coupled with full powers, as the quoted case decides, to cut off all liens, privileges, mortgages, and equities of redemption. If this were not so, the bankrupt law would be a wretched law institute. It cannot be gravely contended that the courts of the United States must turn litigants out of doors and drive them into State courts to terminate proceedings which the United States courts *originated.*

After making its proof of claim, La Société Française could not by any act of its own or of the bankrupt court vest jurisdiction over its claim in a State court. [By such proof it "elected" to take its remedy in the bankrupt court and "waived" all right of remedy elsewhere. (U. S. Bankrupt Law, § 21; Huxton *vs.* Corse, 4 Edwards' Ch. R., 585; S. C., 2 Barbour Ch. R., 531; *In re* Snedaker, 3 N. B. R., 155, 156, 157; *In re* Rosenberg, 2 N. B. R., 81,

82; Stewart *vs.* Isadore, 1 N. B. R., 129; *In re* Paddock, 6 N. B. R., 397.) The proof of its *whole* claim *necessarily presupposes* the "release or conveyance to the assignee" of the *mortgage*. (U. S. Bankrupt Law, § 20; 1 N. B. R., 129, 130; 3 N. B. R., 10, 11; 4 N. B. R., 37; 4 Edwards' Ch. R., 585.)] If it had, *prior to its proof*, begun its foreclosure suit, the assignee might have been legally made a party defendant in place of the bankrupt; but this would have restricted the jurisdiction of the State court to ascertaining *the amount of the claim due*, and then execution must be suspended.

R. S., 5160.

This article presents the only case where, by the *permission* of the district court of the United States in bankruptcy, any, the slightest jurisdiction can be *continued* in the State court. We cannot imagine a case in which a statute of the United States should be more strictly construed, nor one which, if loosely construed, opens the door to greater abuses. We submit that the permission in question cannot be extended to the transfer of a new case from the United States court to a State court, and to the power to confer or devolve jurisdiction, but must be restricted to those cases in which jurisdiction has *already* vested in the State court, and then merely to *continue* it for a *certain purpose* and for a *certain time;* BUT NOT TO CREATE AND CONFER JURISDICTION.

Such is not this case. Here the amount due is precisely and judicially ascertained *long before* the permission of the district court was given to foreclose the mortgage in the State court. The object in granting this permission was to give a judicial sanction to a void proceeding; it was obtained by the assent of the assignee; the judgment granting it is regularly signed by the United States judge;

it is restrained by a proviso: "provided that no judgment "for deficiency in said action be taken by said corporation "against said bankrupt or his said assignee." A wretched after-thought; but, if allowed to stand, the effect of this order will be to inflict a loss upon the mass of creditors of over $5,000 in costs and expenses of not the least benefit, but in every way detrimental to them; and profitable only to the officers of the State court, not to the judge's own officers.

We by no means desire to compel these officers to lose their costs, but to urge their strictest compliance with the laws they too often disregard. Few things are more humiliating to the Judicial Office than the sight of the executive officers of the court reaping a harvest of fees five to ten times larger than the salary of the judge. It leads to grave doubts as to the propriety of the system, and suggests salaries rather than fees.

A bankruptcy is a *universitas juris;* a proceeding *in rem; a concurso* of creditors. Hence, it is but one suit. The analogy is perfect between such a proceeding and the liquidation and settlement of an estate, a condemned prize of war, a sale for taxes, the interdiction of a lunatic, an expropriation for public utility, &c., &c. And all the proceedings are necessarily statutory and *stricti juris.* What the United States district court of California did, in excess of the power conferred by statute, was absolutely null; and neither McHenry nor his wife was bound to notice the nullity. They could appeal, if so minded, or they could take advantage of it whenever it was pleaded against them. These general views are confirmed by the reasoning of this court in two recent cases, one a bankruptcy case, and the other a confiscation case of an enemy-citizen, without any capacity to stand in judgment.

Wiswall *vs.* Campbell, 3 Otto, 347.
Windsor *vs.* McVeigh, 3 Otto, 274.

There was some dissent in the court in the latter case, but not upon any of the above leading principles, which are consonant to reason and justice.

Pedley *vs.* Davis, 100 E. C. L. R., 490–512, and cases there cited.

The distinction between suits (motions, rules, orders, decrees, &c., &c.) growing up in the course of the bankruptcy proceedings, and part and parcel of the individual bankruptcy, and suits between strangers and the assignee, totally independent of the bankruptcy proceedings, has been clearly pointed out in—

Wiswall *vs.* Campbell, *ut ante.*
Claflin *vs.* Houseman, assignee, 3 Otto, 130.
Eyster *vs.* Gaff, 2 Otto, 521.

The present bankrupt law is fast crystalizing into a national institution. It has lasted ten years already; a longer period than both the other laws combined. But the system must be uniform to be useful and constitutional. To tolerate these useless, expensive, disorderly interferences with the normal jurisdiction of the bankruptcy court by a State court is to violate all uniformity, and introduce decisions peculiar to each of the thirty-eight States of the Union.

What we have said on this, the fifth assignment of error, we conceive to be conclusive upon all the other assignments.

3 N. B. R., 218; 4 *Id.*, 646; 5 *Id.*, 122.
In re Brinkman, 7 N. B. R., 421.
In re Sacchi, 6 N. B. R., 497.

Wherefore we pray your Honors to reverse the judgment

of the supreme court of California, and remand the cause, with directions to dismiss the suit and restore the subject-matter thereof to the jurisdiction of the bankrupt court, with all costs, and general relief.

DURANT & HORNOR,
Attorneys for McHenry and Wife.

WASHINGTON, D. C.,
January 16, 1877.

No. 45.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JOHN McHENRY, ET AL.,

Plaintiff's in Error.

VS.

LA SOCIÈTÈ FRANÇAISE D'EPARGNES ET DE PRÉVOYANCE MUTUELLE,

Defendant in Error.

Error to the Supreme Court of the State of California.

Brief for Defendant in Error.

EDMOND L. GOOLD,

Counsel.

SAN FRANCISCO:

EDWARD BOSQUI & CO., PRINTERS, COR. CLAY & LEIDESDORFF STREETS.

1877.

IN THE SUPREME COURT

OF THE

UNITED STATES.

JOHN MCHENRY ET AL.,
Plaintiffs in Error,

vs.

LA SOCIÉTÉ FRANÇAISE D'EPARGNES ET DE PRÉVOYANCE MUTUELLE,
Defendant in Error.

No. 45.

Error to the Supreme Court of the State of California.

Brief for Defendant in Error.

The defendant in error, being the holder and owner of a promissory note of the said John McHenry, sought to foreclose a mortgage by which its payment was secured. The mortgagor having

been adjudicated a bankrupt by the District Court for California, that Court was asked its permission to continue the proceedings; and such permission was granted, the assignee, Montgomery Godley, assenting thereto, in open Court. Rec. p. 15.

There were made parties defendant besides the mortgagor, his wife, Ellen J., C. C. Webb, W. B. Hughes and the assignee, Godley. The prayer was for a decree against the assignee for the amount due, a sale of the mortgaged premises and a decree against the assignee for the deficiency, should there be one. Rec. p. 4, 5.

The assignee and the defendant, Webb, made default, and the defendant Hughes asked only, that any surplus arising from the sale might be applied upon a second mortgage held by him. Rec. p. 10, 11.

The defendants, McHenry, both filed demurrers, which were overruled. Rec. p. 13, 14, 16, 17.

The defendant, Ellen, answered, and, besides setting up a homestead, alleged that, prior to the institution of the suit, the mortgage creditor had proved its debt in her husband's bankruptcy proceedings. Rec. p. 16.

The bankrupt answered, making the same allegation. (p. 17.)

No one disputed the debt.

The District Court of the State directed both these answers to be struck out as shams, (p. 18)

and then made and entered a decree of foreclosure, providing, however, that no party to the action should be held for any deficiency. Rec. p. 21.

John McHenry and his wife, Ellen, appealed to the Supreme Court of the State, by which tribunal the decree was affirmed. P. 30. (See 49 Cal., p. 351.) No other defendants appealed.

All the defendants applied for, and obtained, a writ of error. Rec. p. 30, 32.

The sole defence to the action was, that the creditor had made proof of the debt in bankruptcy.

The complaint does not allege this. The answers, had the fact been proved, presented no defence; and, whether they were properly stricken out or not is a question of State practice, settled by the highest Court of the State, on appeal, and with which this Court will not concern itself.

The defendant, John McHenry, contended that, under Sec. 21 of the Bankrupt Law, a creditor proving his debt is forbidden to maintain an action upon it. A provision similar to this was contained in the Bankrupt Act of 1841. But from that time to this, the decisions have been uniform, that making this proof did not have this effect, and that the creditor could proceed if he obtained permission.

Hoyt et al. *v.* Freel et al., 4 N. B. R., 135.
Dingee *v.* Becker, 9 idem, 509.
In re Iron Mountain Co., 9 Blatchford, 321.

1 Otto 659

In re Metcalf and Duncan, 1 N. B. R., 202, the Court, speaking of this provision, says:

"This is a very clear provision, the object of "which is to prevent a race of diligence between "creditors, and to protect the bankrupt from being "harrassed with suits pending the question of his "discharge. It seems to apply to all cases where "the personal liability of the debtor is sought to "be fixed, or ascertained by a final judgment pend-"ing the determination of the question of his dis-"charge, etc."

Here, the only purpose was the realization of the debt out of the mortgaged premises. The bankrupt could have no interest in such a proceeding. It concerned his creditors only.

This is not, in the sense of the Bankrupt Act, *a suit against the bankrupt* for the recovery of a claim or debt. No judgment for any sum of money is asked for, as against *him*. The prayer is for a foreclosure, and that persons, having no right to resist, shall be barred. The prayer determines the character of the action. Any relief awarded beyond it, is surplusage and void.

The complaint stated that John McHenry claimed some interest in the mortgaged premises, and called upon him to disclose its character. But this he failed to do. He, therefore, had no interest to disclose. Having no interest in the subject of the suit, he had no right to be heard.

In fact, it was not necessary to make him a party defendant.

By Sec. 14 of the Bankrupt Law, all his property had become vested in the assignee of his creditors when this action was brought.

Indeed, the purpose for which this writ of error was brought is a puzzle.

1st. John McHenry and his wife are without interest in the property.

2d. Hughes assents and asks for some of the proceeds of sale.

3d. Godley, the assignee, and Webb, the other defendant, fail to appear in the action.

Possibly, an explanation may be found in the allegation of the defendant Ellen, to the effect that she and her husband are, and have, for some time been, in the occupation of the premises. There being no rent to pay, they may not be in haste to change the conjugal domicile.

As neither of the defendants, Godley, Webb or Hughes, appealed to the Supreme Court of California, neither of them can complain of the action of that Court.

All seem, however, to have lent their names to this proceeding, the frivolous character of which is manifest. A supersedeas was obtained. No question arising under the 25th Sec. is presented here for adjudication, and as the writ of error was plainly taken for delay, the defendant in error prays for an affirmance with damages.

In the Douro, 3 Wall, 564, this Court said:

"We cannot approve the conduct of the counsel "who advised this appeal. An appeal is a matter "of right, and, if prayed, must be allowed; but "should never be prayed without some expectation "of reversal. We impose penalties when writs of "error merely for delay are sued out, in cases of "judgments at law for damages; and if the rule "were applicable to the case before us we should "apply it."

See Pennywit *vs.* Eaton, 15 Wall, 382.—A frivolous writ of error to the Supreme Court of Arkansas, where damages were allowed.

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4 Black 321
Lea Rep 4 Tenn 13
10 Ld 654